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Commissioner of Lobbying of Canada
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Government Relations Institute of Canada (GRIC) and Public Affairs Association of Canada (PAAC) joint submission re: OCL's Lobbyists' Code of Conduct consultation

Executive Summary

These comments are jointly submitted by the Government Relations Institute of Canada (GRIC) and the Public Affairs Association of Canada (PAAC). Our comments have been informed after thorough consultation with our memberships since December when the draft was released.

Overall, we believe the draft code encompasses the key principles and values that form the backbone of Canada's lobbying rules and regulations and does so in direct and plain language.

The overwhelming majority of lobbyists and government relations professionals in Canada conduct their business with the highest ethical standards. A clear Lobbyists' Code of Conduct based on logical and reasonable standards, coupled with the transparency provided by the Registry of Lobbyists, will continue to ensure that Canada has one of the most effective and ethical lobbying regimes in the world. As evidence will show, the existing Code works well and is followed and adhered to every day by lobbyists working in Canada. It is important that in crafting a new Code we address any real concerns or shortcomings with our existing regime and create common sense, logical rules that can be easily understood and enforced.

While we support the general principles behind all seven of the enumerated rules in the draft Code, we firmly believe that some amendments and changes, particularly to the definitions section, are required to ensure the code can function in an effective manner that will be broadly embraced by our membership.

Specifically, GRIC and PAAC respectfully recommend the following which will be detailed in the remainder of our submission.

- **The Code should clearly state that lobbying is a legitimate activity and normal part of our democratic process, and the exchange of ideas and information strengthens government and public administration. It is critical that the Code explicitly state that free and open access to government is an important and integral part of participating in our democracy.**

- **Gifts: The simplest and clearest way to handle gifts is to keep the current wording in the existing Code which relies on ethics rules of the designated public office holders and states that a lobbyist shall not offer or promise a gift, "which the public office holder is not allowed to accept."**

- **Close relationships: Simply having worked in the same office, sat on the same board, or delivered a common program should not necessarily constitute a close relationship between two people.**

- **Political activities: A limitation on registrable activities as a result of political activity is a prima facie violation of Section 2 and Section 3 of the Charter of Rights and Freedoms. The appropriate venue for limiting Charter rights is not a consultation on a non-statutory instrument.**

Additionally, GRIC and PAAC note that the OCL has positioned these proposed changes to the Code as responding to, "preliminary consultation with stakeholders and recent investigations." However, the consultation document makes no attempt to connect the specific proposed changes to any actual evidence of ongoing gaps or problems with the current framework. GRIC and PAAC respectfully submit that before any changes to the Code are adopted, as proposed in the consultation document or otherwise, it is incumbent on the OCL to explain precisely which ongoing, real-world problems the changes will address. In the absence of any explanation from OCL as to which specific cases the proposed changes would address or apply, there is a clear undercurrent of "solutions in search of problems" in this consultation paper.

As some of these changes would further limit Canadians' ability to participate in the electoral process, and/or introduce new material consequences and Charter-limitations to Canadians who choose to participate in the electoral process, it is clearly incumbent on OCL to provide specific real-world examples of situations where the current Code was insufficient to protect the public interest in this regard. Absent specific examples of problems that these proposed changes would address, GRIC and PAAC can only conclude, respectfully, that OCL is proposing these changes because it can, not because there is a need.

Introduction:

We appreciate the opportunity to comment on the draft code. These comments are jointly submitted by the Government Relations Institute of Canada (GRIC) and the Public Affairs Association of Canada (PAAC) after thorough consultation with our memberships.

GRIC is a national, not-for-profit organization, founded in 1994 by government relations professionals in response to the growth and maturing of the industry over the previous several decades. GRIC fosters high standards of practice through professional development and adherence to a code of professional conduct. GRIC also speaks on behalf of Canada's government relations community on matters pertaining to the relationship between the

lobbying industry and government. GRIC's membership includes consultant and in-house lobbyists from non-governmental organizations, national trade associations, charities, universities, and private companies (both domestic and multi-national), extending across the breadth and depth of the Canadian economy.

PAAC is a national, not-for-profit organization founded in 1984. Its principal objective is to help public affairs professionals succeed in their work by providing them with forums for professional development, the exchange of new ideas and networking. PAAC's membership represents a cross-section of the many disciplines involved in public affairs including policy development, government relations, lobbying, communications, opinion research and public relations. PAAC's members come from both the private and public sectors, in areas such as industrial and financial companies, crown corporations, consulting firms, small business, ministries and municipalities, PR organizations, trade associations, educational institutions, law and accounting firms.

The wide-ranging activities of GRIC and PAAC's members reflect the fact that governments are a central part of today's economy. The current pandemic has only emphasized this fact more. Whether as legislators, regulators or customers, governments interact constantly with every sector of the economy. Efforts to ensure that these interactions are carried out in a transparent and ethical fashion are to be applauded. Efforts to curtail or limit interactions between stakeholders and government should be avoided. Rules that limit individual Canadians' involvement in the democratic process that chooses governments are unconstitutional and should be addressed on a priority basis in this proceeding.

Governments' legislative, regulatory and spending decisions impact every Canadian, every day. Government relations professionals are a fundamental part of the democratic process by which government and business, charities, NGOs, academia and civil society interact. Government relations and public relations professionals provide advice and analysis to assist government and their clients in their interactions with each other. They are translators, explaining government's needs to their clients, and their clients' needs to government.

In recognition of this relationship, GRIC and PAAC work together on numerous events and issues of interest to our members. In 2013, we signed a memorandum of understanding, committing the organizations to collaborate on a range of activities, including where possible, developing joint submissions in response to government consultations. As such, we are pleased to jointly submit the following comments to the Office of the Commissioner of Lobbying (OCL) in response to this consultation.

Preamble:

The draft code removes the existing preamble in the current version of the Code and replaces it with Objective, Application and Expectations sections. The information contained in these

sections, is valuable, particularly explicitly stating that Canada's lobbying regime is based on the principles of transparency, respect for government institutions and integrity and honesty. While we do not object to a change in format, we note that some important principles have been lost in deleting the existing preamble.

While we believe the preamble in the existing Code should be retained in its entirety, we would like to highlight two lines we think are particularly valuable to be maintained:

- *Free and open access to government is an important matter of public interest.*
- *Lobbying public office holders is a legitimate activity.*

At the heart of the *Lobbying Act* is a recognition that petitioning government is not a privilege, it is a right. That right extends back through the history of constitutional democracy, protecting the right of individuals, groups and corporations to petition government.

It is important for Canadians to understand that advocacy is an integral and important part of our democracy that leads to better public policy by allowing legislators and other decision makers to interact directly with those stakeholders who will be most impacted by the choices being made. In public policy matters, the best decisions are not made in a vacuum and our Code should clearly state that lobbying is a legitimate and normal part of our democratic process, and the exchange of ideas and information strengthens government and public policy.

The vast majority of government relations professionals conduct their affairs in accordance with the highest standards of integrity, honesty, openness, and professionalism. The Code should be written in a way that fosters transparency and ethical lobbying.

The Code should clearly state that lobbying is a legitimate activity and normal part of our democratic process, and the exchange of ideas and information strengthens government and public administration. It is critical that the Code explicitly state that free and open access to government is an important and integral part of participating in our democracy.

RULE 1 – Transparency:

GRIC and PAAC support the Rules 1.1, 1.3, 1.4 and 1.5 enumerated under this section of the draft Code as they relate to our interactions with public office holders.

With respect to grassroot lobbying appeals to the public, as referred to in the new Rule 1.2 of the draft Code, we believe, as noted earlier in our submission, that the Code of Conduct should not place limits on communications with the general public. It is outside of the authority granted to the Commissioner to create requirements associated with free speech. While the Act can require specific information on communication techniques, it cannot be used to place requirements on that speech, either the medium or its content.

RULE 2 – Misinformation:

GRIC and PAAC support this rule, such that knowingly misrepresenting facts, omitting important details and presenting misleading or false information in any form of lobbying is unethical. However, given there was a need for guidance on the definition of grassroots lobbying, we recommend more specific language to improve clarity regarding the reach of this rule as it pertains to grassroots lobbying.

Our suggested language is as follows:

"Never knowingly misrepresent facts, omit important details or present information that is misleading or false when you lobby officials directly ***or through grassroots lobbying appeals to the public that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to influence a particular opinion****."*

RULE 3 – Gifts:

GRIC and PACC support the wording of the draft Code that prohibits promising or providing a gift to an official other than low-value tokens of appreciation or promotional items. However, we note that the appendix of the draft Code defines low-value as $30 in 2022 dollars. It is easy to imagine a reasonable token of appreciation, such as book given to a conference speaker, exceeding $30 or conversely a low-cost item less than $30 having great personal or sentimental value to a public office holder. We submit that it would be more practical not to assign a specific price to "low value" in the Code but instead state that tokens of appreciation or promotional items must not be reasonably seen to create a sense of obligation between the lobbyist and the designated public office holder.

The current approach in the Code of Conduct is appropriate and not confusing and lobbyists have adopted the approach on gifts and have been working under the rules without any major concerns from your office that we are aware of. We also have significant concerns about how a specific dollar threshold will be enforced. This puts the onus on those hosting a reception, for example, to track whether a public office holder in attendance has had a second glass of $16 Cabernet Sauvignon or has eaten just enough hors d-oeuvres to stay under $30, including tax? Are we really to believe these scenarios would waiver the high standard of ethics of our public office holders, somehow establishing a sense of obligation?

The simplest and clearest way to handle gifts is to keep the current wording in the existing Code which relies on ethics rules of the designated public office holders and states that a lobbyist shall not offer or promise a gift "which the public office holder is not allowed to accept."

This will have the added benefit of preventing a perverse situation, as had happened before, where a lobbyist breaches the Code of Conduct by offering a gift that a public office holder is

allowed to accept. GRIC and PAAC's long-standing position has been that the rules on what types of gifts a lobbyist can offer should be synched to the rules on what types of gifts a public office holder can accept.

RULE 4 – Hospitality:

Similarly, GRIC and PAAC support the new wording for the section on hospitality but as previously mentioned, question the utility and practicality of including a definition in the Code of "low-value." Instead, we would recommend that the Code state that no hospitality should be offered, directly or indirectly, which would reasonably be seen to create a sense of obligation between the lobbyist and the designated public office holder. Again, the rules on what types of hospitality a lobbyist can provide should be synched to the rules on what types of hospitality a public office holder can accept.

While we recognize that some regional flexibility has been contemplated in the draft Code with respect to the $30 threshold, food or beverage at an event or reception could be very different in downtown Toronto or Vancouver (or in a remote Northern community) than it is elsewhere in Canada. While the goal of the Code should be to continue the current practice of permitting reasonable hospitality at a meeting or reception, the Code should refrain from setting a specific arbitrary dollar amount and maintain the current common-sense test that relies on not providing a gift or hospitality that could be reasonably seen to create a sense of obligation between the lobbyist and the designated public office holder.

RULE 5 – Close relationships:

GRIC and PAAC support the clearly stated prohibition against lobbying an official with which one holds a close relationship, but again, we see serious problems with how that term is defined in the appendix of the Code. We understand that close relationships would include family members, those living in the same house, close personal friends, business partners and those with whom you share an economic interest, but the draft definition goes beyond that to include those with a past working relationship "(colleagues or allies in the same office, sitting together on a board of directors, delivering a program or service)."

We submit that the business and financial relationships application sufficiently captures close relationships of an economic nature and that working relationships not be included in the definition in the Code, except for those work relationships that develop into personal relationships or close friendships. Business partnerships or financial relationships involve choice on the part of the individual and there is clear evidence of a close connection. Simply working in the same office, sitting on the same board, or delivering a common program would not necessarily constitute a close relationship between two people. Some offices and boards are

quite large, and colleagues may not have an opportunity to work closely together or, for that matter, remember who they worked with or if they were on a board together, especially if it happened many years ago.

We generally do not choose our work colleagues the way we do our business partners or close friends. **Simply working in the same office, sitting on the same board, or delivering a common program should not necessarily constitute a close relationship between two people.**

RULE 6 – Political work:

Section 10.2(1) of the Lobbying Act specifically notes that the Commissioner shall develop a Lobbyists' Code of Conduct in respect to the activities described in subsections 5(1) and 7(1) of the Act. While the Commissioner does have the authority under Section 10.4 to investigate violations of the Code, neither that authority nor the one found in section 10.2(1) extends to broadening the code beyond the scope of the registration requirements in section 5(1) or 7(1). Neither section 5(1) nor 7(1) refer to the political activities of lobbyists. The plain language of the statute limits the authority to the act of registration and the communications that give rise to those registrations, not any activity that occurs before those communications are even contemplated. If Parliament had intended for the Commissioner to enjoy this specific authority, it would have been overt in its instruction.

A limitation on registrable activities as a result of political activity is a prima facie violation of Section 2 and Section 3 of the Charter of Rights and Freedoms. The appropriate venue for limiting Charter rights is not a consultation on a non-statutory instrument. Knowing that the rights of Canadian citizens are being potentially compromised, it is for Parliament to be deliberate in its considerations of this serious matter. We urge the Commissioner to ask Parliament to be precise in its instructions to the Commissioner and successors on what should be part of a Code of Conduct.

Supporting this view, in June 2010, the Canadian Bar Association (CBA) issued its *Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists' Code of Conduct*[1]. In its opinion, CBA expresses its, "… fundamental concern with the Guidance, and in particular, questions whether the Guidance on Rule 8 *(political activities)* is consistent with the Charter of Rights and Freedoms." Ultimately CBA finds that OCL's treatment of political activities under Rule 8 to be a violation of "lobbyists' freedom of expression under s2(b) of the Charter and . . . not reasonably justified in a free and democratic society under s. 1 (of the Charter)."

With respect to the cooling-off periods in the draft, GRIC and PAAC share significant concern about how these relational cooling-off periods would be managed, tracked and enforced. Will it

[1] https://www.cba.org/CMSPages/GetFile.aspx?guid=3e929d62-045b-47bc-a5ea-3826d9118420

be complaint driven? How will evidence be collected and considered given that the roles individuals take in volunteering in campaigns are not public and there may in fact be no official documentation available?

Notwithstanding our recommendation, should OCL proceed with new Rule 6, GRIC and PAAC strongly urge OCL to revert back to the current guidance wording that focuses on political activities that are strategic in nature or involve significant interaction with candidates. We agree with the rationale that individuals serving in key strategic roles who perform significant political work (e.g.: campaign manager, official agent, strategic advisor or fundraising organizer) could create a perception of a sense of obligation. In these cases, a cooling-off period may be reasonable.

However, for those undertaking political activities that are not strategic in nature and do not involve significant interaction with candidates, there should be no cooling-off period as it impedes on the democratic Charter rights which every Canadian enjoys and which the courts have defined to include the right to meaningfully participate in our electoral process. We strongly oppose applying a cooling-off period to individuals who do this type of non-strategic political work with no significant involvement with a candidate (such as canvassing and distributing campaign materials). Given that it is an unreasonable imposition on someone's democratic rights, it should be deleted entirely. As the draft definitions state, certain activities (e.g.: expressing a personal political opinion, attending a fundraising or campaign event, displaying an election sign, making a digital post, making a political donation within the prescribed limits) do not constitute political work as defined by the Code. These are all constitutionally protected rights to meaningfully participate in the electoral process, but so too are a number of the activities listed under "other political work" of the draft Code. It is unreasonable to apply a one-year cooling-off period to a volunteer knocking on doors but at the same time that person can legally donate the Elections Canada maximum candidate contribution of $1,650 without creating a sense of obligation.

Government relations professionals participate in our democratic and electoral process for the same reason all Canadians do, because they have a democratic right to express the ideas and values that they hold and to promote these with other Canadians. Just as it is unreasonable to believe that a public office holder would develop a sense of obligation because a lobbyist gives them the relatively modest amount permitted by Elections Canada, it is even more unreasonable to suggest that a sense of obligation has been created by someone who canvassed or dropped off flyers for a candidate's campaign. It would be an unreasonable restriction to subject individuals who exercise their right to participate in minor, non-strategic roles in a campaign to a one-year cooling-off period. There should be no cooling-off period for what the current guidance calls low-risk political activities with no significant interaction with the candidate.

It is also worth noting that while electoral district associations (EDAs) take on many of the tasks assigned as 'political work' in the Code, they are not property of the candidate. They are creatures of statute, defined by the *Elections Canada Act* with a stated legal purpose. Volunteering for an EDA should not be viewed as akin to offering a personal loan or gift to the candidate.

It is also important to ensure that the Code minimally impairs the democratic rights of all Canadians, because it is essential that the Office of the Commissioner of Lobbying and the rules and regulations it enforces remain politically neutral. The draft Code as it is written would potentially place greater restrictions on supporters of parties or candidates who have the potential of forming government (Liberals, Conservative and NDP) while minimally impairing the political activity of supporters of parties who do not run a full slate or candidates or have any chance of forming government (Bloc Quebecois, Greens, People's Party, independents). Since we know a Bloc Quebecois candidate, for example, will never be a Prime Minister, Minister or Parliamentary Secretary, a lobbyist would be free to be a strategic advisor in the leader's central campaign headquarters, lead their fundraising efforts or prepare the leader for national debates. This is not the case for supporters of other major parties. We should obviously be very careful about establishing codes of conduct that treat Canadians differently based on their political beliefs.

Another concern we have with the political work section of the draft Code is the decision to deem Parliamentary Secretaries as associates of their Ministers and their staff and subject a lobbyist to a cooling-off period to the whole group if, for example, that person dropped off flyers one time for someone who ultimately became a Minister or Parliamentary Secretary. Since the Code should minimally impair the fundamental democratic rights of anyone, we submit that a cooling-off period should only apply to candidates who someone actually does political work for and their direct staff. To maintain the principle that better public policy is made if public office holders receive free access to information required to make good decisions which impacts stakeholders, our goal should not be to block a lobbyist from interacting completely with a particular ministry. The benefit of having Parliamentary Secretaries in our system is that if an individual is to refrain from lobbying a particular Minister (due to say a close relationship or strategic political work) they could still share their client or industry's information or advocacy via the Parliamentary Secretary or their staff.

RULE 7 – Sense of obligation:

A key principle that is mentioned several times in the existing Code is that a lobbyist not do anything that would create a sense of obligation for a public office holder. In the view of GRIC and PAAC, this is the fundamental backbone of the Lobbyists' Code of Conduct and a key concept that we would like to see better reflected in a revised Code. As government relations

professionals, we know that our overriding value to our clients or employers is understanding how public policy decisions are made and our ability to assist them in crafting the best case for their advocacy based on the merits of the matter at hand. Any serious review will confirm that, in our system, government decisions are not being made because lobbyists have created a sense of obligation with public office holders and the provisions of the Code should help reassure Canadians of any perceptions to the contrary. GRIC and PACC support the wording of this provision and as previously stated, believe the concept of avoiding a sense of obligation should be extended to other sections of the code.

Appendix: definitions

General terms - definition of registrant:

The language of the existing Code states that the responsible officer (which is defined as the most senior paid employee of an organization or corporation) "shall ensure that" employees who lobby are informed of their obligations under the *Lobbying Act* and the Lobbyists' Code of Conduct. Since the most senior paid employee of a corporation or association is normally the CEO, Board Chair or President, the wording of the current Code allows this function to be delegated to someone to ensure that all employees are informed and comply with their obligations, without expecting that the CEO of a major corporation will do this task personally. The new Code drops the "shall ensure that" language and instead defines the employee holding the most senior paid office of a corporation or organization as the registrant "who is responsible for registering the lobbying carried out by employees for the employer". We would recommend that for clarity's sake, this be amended to "who is responsible for ensuring the registration of lobbying carried out by employees for the employer." This will ensure that CEOs or heads of associations remain ultimately responsible for ensuring all employees register their applicable lobbying activities, but that they can delegate this function and do not have to do it personally, which would be a practical impossibility for those leading large corporations or associations in which hundreds or even thousands of employees may have obligations under the Act and Code.

Conclusion

GRIC and PAAC believe that the *Lobbyists' Code of Conduct* plays an important role in ensuring that our members work in an industry that adheres to the highest standards of integrity, honesty, openness, professionalism and transparency.

The Code is built around ensuring transparency and preventing actions that would create a sense of obligation for a public office holder. These are undeniably the right principles, and the Code must be detailed in a manner that permits lobbyists to clearly understand their

obligations. Virtually all lobbyists, since the Code has been established, have followed it and the pursuit of greater Code clarity can only ensure that continues.

Specifically, GRIC and PAAC respectfully recommend the following:

- **The Code should clearly state that lobbying is a legitimate activity and normal part of our democratic process, and the exchange of ideas and information strengthens government and public administration. It is critical that the Code explicitly state that free and open access to government is an important and integral part of participating in our democracy.**

- **Gifts: The simplest and clearest way to handle gifts is to keep the current wording in the existing Code which relies on ethics rules of the designated public office holders and state that a lobbyist shall not offer or promise a gift "which the public office holder is not allowed to accept."**

- **Close relationships: Simply working in the same office, sitting on the same board, or delivering a common program should not necessarily constitute a close relationship between two people.**

- **Political activities: A limitation on registrable activities as a result of political activity is a prima facie violation of Section 2 and Section 3 of the Charter of Rights and Freedoms. The appropriate venue for limiting Charter rights is not a consultation on a non-statutory instrument.**

The Code in its current form is not broken by any means. Lobbyists have adapted to it notwithstanding the gray areas that require guidance. The revised guidances on Gifts, Political Activities and Preferential Access which were updated in 2019 added much needed clarity and we believe struck a reasonable balance. Unfortunately, the current draft version of the Code contains elements that are unworkable, unenforceable and present an overreach specifically as described above with the definitions of close relationships, low-value gifts and political activities.

We appreciate the Commissioner holding this consultation to be open and collaborative in determining how to make the Code more effective. We are available to meet to discuss these recommendations or other practical suggestions for ensuing Canada continues to have lobbying rules and a regime of which we can all be proud.

– END –